

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34424

CHRISTOPHER WALLISER,	)	2008 Unpublished Opinion No. 619
	)	
Petitioner-Appellant,	)	Filed: August 26, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Third Judicial District, State of Idaho, Gem County. Hon. Renae J. Hoff, District Judge.

Order dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Christopher Walliser appeals from the district court's order dismissing his application for post-conviction relief following an evidentiary hearing. For the reasons stated below, we affirm.

**I.**

**FACTS AND PROCEDURE**

In April 2002, Walliser pled guilty to possession of a controlled substance, methamphetamine, in Case No. CR02-167. Walliser was sentenced to a unified term of four years, with a minimum period of confinement of one and a half years. Walliser's sentence was suspended and he was placed on probation. After a subsequent violation, Walliser completed a period of retained jurisdiction and was again placed on probation. On April 24, 2005, Walliser attempted to use counterfeit gas tokens. After an attendant notified police, a responding officer observed Walliser walking away from him and placing an object on a pay phone that later turned out to be a planner containing methamphetamine and other drug paraphernalia. Walliser was

arrested and charged with possession of a controlled substance and possession of drug paraphernalia with the intent to use, in Case No. CR05-1103.

In June 2005, the state filed a petition for probation violation in Case No. CR02-167 based on the events of April 24, as well as other alleged violations including an admission from Walliser that he used methamphetamine on May 2, 2005. In Case No. CR05-1103, the state amended its charge for possession of a controlled substance, changing the date of the offense from April 24, 2005, to May 2, 2005. Walliser then pled guilty to possession of a controlled substance, and the state dismissed the other charges, including the probation violation in Case No. CR02-167. Before the sentencing hearing, however, Walliser failed to report to his supervising officer and admitted to using methamphetamine on two more occasions. A second petition for probation violation was filed in Case No. CR02-167. Based on his guilty plea to possession of a controlled substance, Walliser was sentenced to a unified term of five years, with a minimum period of confinement of two and a half years. Walliser also admitted to the new probation violation, and the district court ordered execution of his previously suspended sentence of a unified term of four years, with a minimum period of confinement of one and a half years. The district court ordered that Walliser's sentences run concurrently.

Walliser filed an application for post-conviction relief alleging that his guilty plea in Case No. CR05-1103 was involuntary because he believed that he was admitting the first probation violation for his use of methamphetamine on May 2, 2005, not that he was pleading guilty to the charge of possession of methamphetamine on May 2. He also alleged ineffective assistance of trial counsel for failing to file a motion to withdraw the plea based on Walliser's misunderstanding. Following an evidentiary hearing on Walliser's application, the district court found that Walliser fully understood the charge to which he pled and that he had failed to show the requisite deficient performance and prejudice for ineffective assistance of counsel. Therefore, the district court dismissed Walliser's application for post-conviction relief. Walliser appeals.

## **II.**

### **ANALYSIS**

An application for post-conviction relief initiates a proceeding which is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct.

App. 1992). In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). In determining whether a finding is clearly erroneous, we inquire only whether the findings are supported by substantial and competent evidence. *Erickson v. Flynn*, 138 Idaho 430, 434, 64 P.3d 959, 963 (Ct. App. 2002). Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. *Id.* We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

#### **A. Involuntary Guilty Plea**

Walliser alleges that his guilty plea to possession of methamphetamine on May 2, 2005, was involuntary because he believed that he was only admitting to using methamphetamine on May 2 in violation of his probation. He argues that he has shown by a preponderance of the evidence that: he always denied possession of methamphetamine in the planner; the prints on the planner did not match his; and, he was confused by the state's amendment to the complaint changing the date of the possession charge to the date that he had freely admitted using methamphetamine.

As evidentiary support for his application at his post-conviction evidentiary hearing, Walliser relied only on an affidavit from his post-conviction counsel along with certain attached exhibits. The attached exhibits included transcripts from the change of plea and sentencing hearings, police and lab reports, previous judgments of conviction, the criminal complaint and petitions for probation violation, as well as billing records and one page of file notes from one of Walliser's trial counsel. The state stipulated to submit the case based on this evidence, and no witnesses were called or testimony was presented by Walliser.

At the change of plea hearing, the state amended the date of the charge of possession of a controlled substance to May 2, 2005, indicated that it would dismiss the probation violation, and

that Walliser would “enter a plea of guilty to the possession of methamphetamine charge.” The district court then asked Walliser a series of questions relating to his understanding of his plea to possession of methamphetamine:

- Q: And Mr. Walliser, you’ve been listening; is that correct?  
A: Yes, ma’am.  
Q: And is that how you want to proceed?  
A: Yes, ma’am.  
...  
Q: And when did you decide you were going to plead guilty to this possession of methamphetamine charge approximately?  
A: Two weeks ago.  
...  
Q: Are you pleading guilty because you did possess methamphetamine?  
A: Yes, ma’am.  
...  
Q: So this would be at least your third felony conviction?  
A: Yes, ma’am.  
...  
Q: Okay. I ask you then how you plead to possession of methamphetamine on the 2nd day of May, 2005, in Gem County, Idaho?  
A: Guilty, Your Honor.

The district court accepted Walliser’s plea and then addressed the dismissal of the probation violation:

All right. I’ll go ahead today and dismiss the probation violation contingent on the plea agreement and upon you appearing for sentencing.

At the evidentiary hearing on Walliser’s application for post-conviction relief, the district court reviewed the above colloquy, the sentencing proceedings during which the new probation violation was also considered, as well as the remaining evidence. The district court found that “it’s very clear that there was a previously dismissed probation violation in which he admitted use, there’s the new probation violation that he admitted use, . . . and there’s no talk then about the May date being wrong that it was changed to.” The district court determined that Walliser understood that he was pleading guilty to possession of methamphetamine.

The weight to be given to the evidence and the inferences to be drawn thereupon were matters solely within the province of the district court. Further, we must view the evidence in the light most favorable to the trial court’s finding. *See McKeeth v. State*, 140 Idaho 847, 849, 103 P.3d 460, 462 (2004). Upon review of the record, we conclude that Walliser failed to meet

his burden of proving by a preponderance of the evidence that his plea was unknowing or involuntary. To the contrary, the record clearly belies his allegation. The district court's finding regarding Walliser's intent to plead guilty to possession of methamphetamine, and not to a probation violation stemming from his use of methamphetamine, was supported by substantial evidence. Walliser has failed to show error.

**B. Ineffective Assistance of Counsel**

Walliser was represented by two different counsel at the trial level in the underlying criminal matters. Initial counsel represented him through the change of plea hearing. After the change of plea hearing, Walliser was appointed new counsel which represented him through sentencing. Walliser alleges ineffective assistance of sentencing counsel for failing to file a motion to withdraw his guilty plea based on sentencing counsel's knowledge that Walliser may not have been aware of what he pled guilty to. Walliser's only evidence offered in support of this allegation is Exhibit M attached to post-conviction counsel's affidavit. Exhibit M is a handwritten timesheet entry made by Walliser's sentencing counsel. The entry notes that counsel received and reviewed the presentence investigation report (PSI) and that it "appears [Walliser] does not know what he pled to." The time counsel charged for the PSI review totalled twelve minutes and the entry was made prior to sentencing counsel's first conversation with Walliser.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless

those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*

In this case, the district court determined at the evidentiary hearing on Walliser's post-conviction application that Walliser's guilty plea to possession of methamphetamine was voluntarily and knowingly entered. Therefore, the district court found no merit, on the evidence before it, that sentencing counsel was deficient or that Walliser suffered any prejudice for failing to file a motion to withdraw the plea. Sentencing counsel's timesheet entry that Walliser may not have known what he pled to, made before even speaking with Walliser, does not satisfy Walliser's burden of establishing ineffective assistance by a preponderance of the evidence. Furthermore, because we agree with the district court that Walliser failed to show that his plea was not voluntary and knowing, we conclude that any motion to withdraw such a plea also had no probability of success. Thus, the district court did not err in rejecting Walliser's post-conviction claim of ineffective assistance of trial counsel.

### **III.**

### **CONCLUSION**

The district court's finding that Walliser failed to establish by a preponderance of the evidence that his guilty plea to possession of methamphetamine was not knowing and voluntary is supported by substantial evidence. Any motion to withdraw such a plea would have had no probability of success. Thus, the district court was correct in finding that Walliser also failed to carry his burden to prove that trial counsel was ineffective. Therefore, we affirm the district court's order dismissing Walliser's application for post-conviction relief. No costs or attorney fees are awarded on appeal.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**